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OPINION 13-0227

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71 – 1 – 1 – MUNICIPAL FIRE & POLICE CIVIL SERVICE

La. R.S. 40:2531

Mr. Robert S. Lawrence
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La. R.S. 40:2531 requires the recording of any questioning of a police employee or law enforcement officer during a pre-disciplinary hearing conducted by the appointing authority. Such questioning, provided it arises out of the conduct which the police employee has been noticed is the subject of the hearing, would not constitute a new investigation under La. R.S. 40:2531. Lastly, municipal fire and police civil service boards have the same power and authority as a district court to subpoena witnesses and compel the production of books and papers pertinent to any authorized investigation or hearing.

Dear Mr. Funderburk and Mr. Lawrence:

Our office received a request for an opinion submitted on behalf of the City of Abbeville ("Abbeville") on issues pertaining to the recording of pre-disciplinary matters involving police officers. Shortly thereafter, we received an additional request from the State Examiner relating to the issues raised in the initial request. Considering the relatedness of the two requests and in the interest of efficiency, we have combined your requests into one opinion.

In particular, your requests ask for an opinion on the following questions:

- (1) Does the Police Officers' Bill of Rights, La. R.S. 40:2531, *et seq.*, require the recording of a pre-disciplinary hearing which is conducted by the appointing authority in a properly called and noticed executive session?
- (2) Does the Police Officers' Bill of Rights require the recording of the statement of the police officer, who was the subject of an Internal Affairs investigation, during a subsequent pre-disciplinary hearing which is conducted by the appointing authority during a properly called and noticed executive session?

- (3) If an employee under investigation is questioned during the pre-disciplinary hearing conducted by the appointing authority regarding the employee's behavior, would such additional questioning constitute a new investigation?
- (4) Does the Police Officers' Bill of Rights require the appointing authority to record the questioning referenced in Question 3?
- (5) Is the Municipal Fire and Police Civil Service Board authorized to subpoena witnesses and/or records related to the pre-disciplinary hearing which was conducted by the appointing authority in executive session and which resulted in a disciplinary action?

As an initial matter, we address the various questions relating to the requirement to record certain matters which involve the investigation of a police officer. As a matter of background, your questions relate to a scenario whereby a police officer has been accused of impropriety, an investigation has been completed by the police chief, and the matter has been referred to the appointing authority to determine whether disciplinary action is appropriate.

The City of Abbeville is governed by a legislative charter. Section 3 of the Charter describes the powers of the City, Subsection 11 providing:

Said city shall have and is hereby vested with power:

. . .

(11) To make all needful police regulations for the preservation of good order and the peace of the city; to provide for the selection of such officers as may be found necessary hereafter and to prescribe their duties and fix their compensation; to provide for the removal of officers for misconduct or neglect of duty and to remove appointive officers and discharge employees at pleasure.

You have indicated that the elected chief of police has the authority to impose limited, immediate disciplinary action concerning employees of the police department, subject to confirmation or review by the City.¹ As referenced in your request letter, the law

¹ Section 4 of the Legislative Charter for the City of Abbeville describes the authority of the chief of police, providing:

There shall be elected a chief of police, who shall direct and be responsible for the prevention of crime, law enforcement, assistance to the courts and other law enforcement officials and the maintenance of peace and order of the city. The chief of police shall be elected at the same time as the mayor and members of the city council. The chief of police shall have complete and total responsibility for the assignment and administration of personnel and equipment within the Abbeville police department. The chief of police shall be directly responsible for the operation and administration of the police department

provides minimum standards which apply to law enforcement officers during an investigation. La. R.S. 40:2531.² Some of your questions reference the obligation to record an interrogation of a police officer. The right to have an interrogation recorded is covered by La. R.S. 40:2531(B)(3), which provides:

Whenever a police employee or law enforcement officer is under investigation, ...

...

[a]ll interrogations of any police employee or law enforcement officer in connection with the investigation shall be recorded in full. The police employee or law enforcement officer shall not be prohibited from obtaining a copy of the recording or transcript of the recording of his statements upon his written request.

As indicated in the above statute, when a police employee or law enforcement officer is under investigation, all interrogations conducted in connection with the investigation shall be recorded in full. There is no dispute that the individuals at issue are police employees or that such individuals have been subjected to some type of investigation. The issue at the heart of your questions is whether the recordation requirement for “interrogations” referred to in the above-statute is intended to apply only to an investigation into the police officer by the chief of police, or whether this statute would also impose the recordation requirement for investigations into the actions of the police officer that are conducted by the appointing authority.

The applicability of La. R.S. 40:2531 is discussed in Subsection (A), which provides that the listed categories of police employees are entitled to the rights and protections of the statute when such individuals “are under investigation with a view to possible disciplinary action, demotion, or dismissal.” La. R.S. 40:2531(B)(7) provides a timeline for investigations of alleged misconduct of police officers. It requires the chief of police or the superintendent of state police, as the case may be, to initiate an investigation within fourteen days of the date a complaint is made and to complete the investigation within sixty days from its commencement (unless an extension is granted by the appropriate authority or mutually agreed upon by the parties to the investigation). La. R.S. 40:2531(B)(7) also provides that an “investigation shall be considered complete upon notice to the police employee or law enforcement officer under investigation of a pre-disciplinary hearing or a determination of an unfounded or unsustained complaint.” We are of the opinion that this designation of when an investigation is considered “complete” is solely for the purpose of determining whether the deadlines in this subsection have been met and does not foreclose the extension of the protection found elsewhere in the statute to proceedings before the appropriate municipal governing

and all necessary matters incidental thereto. The compensation of the chief of police shall be fixed by the city council.

² The rights afforded to law enforcement officers under investigation are commonly referred to as the “Police Officers’ Bill of Rights.”

authority or civil service board that may take place subsequent to the completion of the initial phase of a disciplinary investigation.

Although, admittedly, La. R.S. 40:2531(B)(7) seems to indicate that an investigation is concluded when notice is provided of a pre-disciplinary hearing or determination of an unfounded or unsustained complaint, it is the opinion of this office that when looking at the statute in its entirety, it appears to this office that the protections afforded to police employees remain available as long as police officer remains under investigation and there is a possibility of resulting disciplinary action, demotion or dismissal. The result of a “completed” investigation referred to in (B)(7) is not a final disciplinary action, demotion or dismissal, but rather the police chief’s recommendation to the appointing authority of what, if any, disciplinary action should be taken against the police employee at issue at the next phase of the investigation process. Therefore, it is the opinion of this office that the rights afforded by this statute are not necessarily limited to the investigation by the police chief or superintendent of state police into allegations of wrong doing that must be “completed” within the time limits set forth in (B)(7), but these rights also remain in place during any investigation done by the appointing authority when it considers whether disciplinary action should be imposed against the officer.³

This conclusion is consistent with La. Atty. Gen. Op. No. 93-52, where our office explained:

LSA-R.S. 40:2531 does not specifically provide for a definition of “investigation.” However, Black’s Law Dictionary defines the term as the process of inquiring into or tracking down through inquiry. Black’s further defines the term “investigate” as follows:

To follow up step by step by patient inquiry or observation.
To trace or track; to search into; to examine and inquire into
with care and accuracy; to find out by careful inquisition;
examination; the taking of evidence; a legal inquiry.

From this definition, it is our opinion that if the investigation requires a close study or systematic inquiry into a situation, the protections afforded an officer under LSA-R.S. 40:2531 apply. Moreover, one must not overlook the express language of the statute. The term “investigation” is modified by the phrase “with a view to possible disciplinary action, demotion, or dismissal.” Therefore, if any of the three results are possible, then the officer is afforded the protections of LSA-R.S. 40:2531.

³ This conclusion is supported by the language in La. R.S. 40:2531(B)(4)(c), which states: “The police employee or law enforcement officer’s representative or counsel shall be allowed to offer advice to the employee or officer and make statements on the record regarding any question asked of the employee or officer at any interrogation, interview, or hearing in the course of the investigation.” This language implies that a hearing can take place in the course of an investigation.

...

The term “possible disciplinary action” should be construed broadly so that the purpose of protecting officers under investigation is made effective to the fullest extent possible under the language of LSA-R.S. 40:2531. Because “disciplinary action” is used in the same phrase as “demotion” and “dismissal,” it is our opinion that any action taken by formal investigating authorities, such as the municipal international affairs department, which could possibly affect the job status of the officer requires that the minimum standards of LSA-R.S. 40:2531 apply.

The importance of complying with this statute in the process of imposing any disciplinary action on a police employee is significant, as La. R.S. 40:2531(C) makes clear that failure to comply results in an absolute nullity of the action taken:

There shall be no discipline, demotion, dismissal, or adverse action of any sort taken against a police employee or law enforcement officer unless the investigation is conducted in accordance with the minimum standards provided for in this Section. Any discipline, demotion, dismissal, or adverse action of any sort whatsoever taken against a police employee or law enforcement officer without complete compliance with the foregoing minimum standards is an absolute nullity.

The first two questions of your request specifically concern the obligation to record a pre-disciplinary hearing which involves a police employee or law enforcement officer and the hiring authority, when such hearing occurs after the Chief of Police has made his investigation and referred the matter to the Council as the hiring authority. Considering the above discussion of La. R.S. 40:2531, particularly the conclusions that the rights and protections called for in the statute apply to individuals who are under investigation with a view to impose possible disciplinary action, and that all interrogations of any police employee or law enforcement officer in connection with the investigation shall be recorded in full, it is the opinion of this office that if a pre-disciplinary hearing includes the Council’s questioning of the police employee whose employment is at issue, then the protection afforded by La. R.S. 40:2531(B)(3) requires that any such questioning be recorded.

However, please be advised that any such recording done of a pre-disciplinary hearing conducted by the appointing authority in a properly called and noticed executive session is not subject to disclosure under the Public Records Act. See La. Atty. Gen. Op. No. 09-0048. There, we observed that La. R.S. 44:4.1(B)(28) specifically recognizes La. R.S. 42:6.1 [redesignated as La. R.S. 42:17 in the 2010 Louisiana Legislative Session] as an exception to the Public Records Act and therefore “any records maintained by public bodies of executive sessions held pursuant to La. R.S. 42:6.1. . . would not be subject to disclosure under the Public Records Act.”. *Id.*

Your opinion request notes the decision of the Second Circuit in *Ouachita Parish Police Jury v. Ouachita Parish Fire Protection District No. 1 Civil Service Board*, 46,480 (La. App. 2 Cir. 9/21/11), 72 So.3d 987, 991-92, in which the court held that a police jury's questioning of a firefighter during executive session constituted an "interrogation" that was required to be recorded; the failure to record such interrogation rendered the termination null; and the firefighter's voluntary participation in the executive session could not be viewed as a waiver of the requirement to record.

As noted above, this case involved a firefighter, and similar to the Police Officers' Bill of Rights, there is a law applicable to fire employees that provides minimum standards, protections and rights to fire employees under investigation. La. R.S. 33:2181. Similar to the statute concerning police employees, any interrogation of fire employees conducted in connection with a disciplinary investigation must be recorded; however, we note that the language of the two laws is not identical.

La. R.S.40:2531(B)(3) provides that all interrogations of any police employee or law enforcement officer in connection with the investigation shall be recorded in full. La. R.S. 33:2181(B)(4) similarly requires that all interrogations of any fire employee in connection with an investigation be recorded in full. Notably, La. R.S. 40:2531 does not contain a definition of "interrogation." La. R.S. 33:2181(A)(2), however, defines an "interrogation" as including:

...any formal interview, inquiry, or questioning of any fire employee by the appointing authority or the appointing authority's designee regarding misconduct, allegations of misconduct, or policy violation. An initial inquiry conducted by the fire employee's immediate supervisors shall not be considered an interrogation.

The court in the *Ouachita Parish Police Jury* decision reached its conclusion by examining the definition of "interrogation" in La. R.S. 33:2181. 72 So.3d at 991. This definition clearly includes within its scope the questioning of the fire employee by the appointing authority. Due to the fact that the statutes are not identical, and the Second Circuit's reliance on the definition of "interrogation" provided by La. R.S. 33:2181, we do not think the conclusion reached in *Ouachita Parish Police Jury* is conclusive authority for interpreting the requirements of La. R.S. 40:2531. Despite this distinction though, for the reasons previously addressed, this opinion nonetheless reaches a conclusion similar to that reached in the *Ouachita Parish Police Jury* decision that any questioning of a police employee or law enforcement officer done by the appointing authority in executive session constitutes an interrogation in connection with a disciplinary investigation, and therefore must be recorded in full.

The third question, this one posed by the State Examiner, also concerns questioning during a pre-disciplinary hearing. Specifically, you ask whether any questioning of a police employee under disciplinary investigation regarding the employee's behavior by the appointing authority during a pre-disciplinary hearing constitutes a new

investigation. Then you ask whether any such questioning would need to be recorded under La. R.S. 40:2531.

As discussed above, it is the opinion of this office that any questioning by the appointing authority during a pre-disciplinary hearing constitutes an interrogation under La. R.S. 40:2531 and therefore must be recorded. If the questioning by the appointing authority referenced in question 3 concerns or arises out of the conduct for which the disciplinary action is being considered, then such questioning would not, in the opinion of this office, constitute a new investigation.

The final question of the State Examiner's request concerns whether the Municipal Fire and Police Civil Service Board is authorized to subpoena witnesses and/or records related to the pre-disciplinary hearing which was conducted by the appointing authority in executive session and which resulted in a disciplinary action.

La. R.S. 33:2502⁴ provides:

The board, and each of its members, shall have the same power and authority to administer oaths, subpoena witnesses, and compel the production of books and papers pertinent to any investigation or hearing authorized by this Part as is possessed by the district courts of Louisiana.

Any person who (1) fails to appear in response to a subpoena, (2) fails to answer any question, except those which may incriminate him, (3) fails to produce any books or papers pertinent to any investigation or hearing, or (4) knowingly gives false testimony therein shall be subject to the penal Sections of this Part. In case of contumacy or refusal to obey a subpoena issued to any person, the district court within the jurisdiction of which the investigation is being carried on, or within the jurisdiction of which the person guilty of contumacy or refusal to obey is found, or resides, or transacts business, upon application of the board, shall have the requisite jurisdiction to issue to the person an order requiring him to appear before the board, its member or agent, and to produce the required evidence or give testimony touching the matter under consideration or in question.

Any person failing to obey such order may be punished by the court for contempt.

Any officer or employee in the classified service who wilfully refuses or fails to appear before any court, officer, board, body, or person properly authorized to conduct any hearing or inquiry, or any employee or officer,

⁴ La. R.S. 33:2502 is contained in Part II, *Fire and Police Civil Service Law for Municipalities Between 13,000 and 250,000*, located in Chapter 5, *Civil Service* of Title 33. Part III is titled *Fire and Police Civil Service Law for Small Municipalities and for Parishes and Fire Protection Districts*, and contains La. R.S. 33:2562, which provides for the subpoena powers of a fire and police civil service board subject to this Part. La. R.S. 33:2562 provides for substantially the same powers and authority as is provided for in La. R.S. 33:2502 for larger jurisdictions covered by Part II.

who, having appeared, refuses to testify or answer any relevant question relating to the affairs of government of the municipality or the conduct of any municipal officer or employee, except upon the ground that his testimony or answers would incriminate him, shall, in addition to any other penalty to which he may be subject, forfeit his position, and shall not be eligible for appointment to any position in the classified service for a period of six years.

In accordance with La. R.S. 33:2502 and La. R.S. 33:2562, municipal fire and police civil service boards have the same power and authority as a district court to subpoena witnesses and compel the production of books and papers pertinent to any authorized investigation or hearing. See also La. Atty. Gen. Op. No. 92-172, which concluded that the Bogalusa Municipal Fire and Police Civil Service Board has the authority to issue subpoenas and/or subpoenas duces tecum for the production of books and records for pre-hearing purposes.

In conclusion, it is the opinion of this office that La. R.S. 40:2531 requires the recording of any questioning of a police employee or law enforcement officer during a pre-disciplinary hearing conducted by the appointing authority. Such questioning, provided it arises out of the conduct which the police employee has been noticed is the subject of the hearing, would not constitute a new investigation under La. R.S. 40:2531. Lastly, municipal fire and police civil service boards have the same power and authority as a district court to subpoena witnesses and compel the production of books and papers pertinent to any authorized investigation or hearing.

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

BY: _____
Emalie A. Boyce
Assistant Attorney General

JDC:EAB

SYLLABUS

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DATE ASSIGNED:

DATE RELEASED: May 20, 2014

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